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Criminal Procedure—Admissibility of Confession After Request for Counsel Ignored

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tion. Unlikely or not, as this note goes to the publishers, a recent decision in the Appellate Division has extended the rule to confessions obtained prior to indictment.[39]

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ADMISSIBILITY OF CONFESSION AFTER REQUEST FOR COUNSEL IGNORED

The Court of Appeals, in *People v. Noble*,[40] was once again called upon to decide whether a conviction for first degree murder was to be set aside because of the use of certain statements claimed to be involuntary.

Three judges agreed that where an Assistant District Attorney ignored defendant's inquiry as to his right to counsel before making the statements, the use of the statements at his trial violated the fundamental fairness essential to the concept of justice and constituted an invasion of defendant's privilege against self-incrimination. Two judges concurred for reversal but on the limited ground that the People failed to prove beyond a reasonable doubt that defendant's confession was voluntary. Two judges dissented reasoning that since there is no duty to tell the defendant of his rights and privileges,[41] declining to advise is no more prejudicial than failing to advise.

The position taken by the three judges clearly goes beyond the due process requirements of the Fourteenth Amendment and further expands the rights of the accused in regard to the use of admissions and confessions obtained by police officers in the interim between arrest and trial. In 1936, the United States Supreme Court was first called upon to apply the due process clause to a case involving a state court conviction for first degree murder based on the use of a coerced confession.[42] The Court held that conviction on a confession which was admittedly coerced violated the due process clause of the Fourteenth Amendment.

Eight years later, in *Ashcraft v. Tennessee*, a more liberal Court held that 36 hours of continuous questioning without sleep rendered the confession inherently coerced.[43] A strong dissent reasoned that while it was true that long and persistent questioning was coercive, so is arrest alone. They stated that the test heretofore was ". . . whether the confessor was in possession of his own will and self-control at the time of the confession." The dissent's conclusion was that the confession was voluntary and trustworthy and, therefore, its use did not violate due process of law.

By 1952, the Court had returned to the position taken by the dissent in *Ashcraft* and in 1953, it further refined the voluntary-trustworthy test to the extent that it became a question of whether the procedure used (e.g., interrogation) had a coercive effect upon the particular person making the confession.[44] In 1958, the Court held in *Payne v. Arkansas* that if the confession was co-

39. People v. Meyer,—A.D.2d—(1st Dep't October 10, 1961).
40. 9 N.Y.2d 571, 216 N.Y.S.2d 79 (1961).
41. People v. Randazzio, 194 N.Y. 147, 87 N.E. 112 (1909).
42. Brown v. Mississippi, 297 U.S. 278 (1936).
43. Ashcraft v. Tennessee, 322 U.S. 143 (1944).
44. Stein v. New York, 346 U.S. 156 (1953).

erced, the fact that there was sufficient other evidence to uphold the conviction could not prevent the Court from reversing the conviction since the use of the coerced confession alone required reversal.[45] In the same year, two important cases arose bearing strong resemblance to the instant case.

The first, *Crooker v. California*,[46] involved a defendant who had a college education as well as one year of law school. The defendant made specific requests to contact an attorney which were denied. The Court said, "To be sure, coercion seems more likely to result from state denial of a specific request for opportunity to engage counsel than it does from state failure to appoint counsel immediately upon arrest. *That greater possibility*, however, is not decisive. It is negated here by [defendant's] age, intelligence, and education. . . . On this record we are unable to say that [defendant's] confession was anything other than voluntary."[47] (Emphasis added.) It also rejected the argument that even if the confession was voluntary, it violated due process since it came after defendant's request to contact an attorney. In substance the Court said, in answer to the argument, that such a rule would create an anomaly since if nothing prejudicial to the accused happened subsequent to the request, nothing would remain that could be corrected on a new trial. Refusal would then be an absolute bar to conviction. And if something prejudicial to the accused had occurred, it ". . . would have a lesser but still devastating effect on enforcement of criminal law, for it would effectively preclude police questioning—*fair as well as unfair*—until the accused was afforded opportunity to call his attorney. . . ."[48] The dissent's position in the 5-4 decision was that as long as the accused could be denied counsel at this critical point in his ordeal, the danger of the third degree would continue.

In the second case, *Cicenia v. La Gay*,[49] although the defendant lacked the educational background of the defendant in *Crooker*, the Court upheld the conviction on the grounds that the denial of counsel is only one more element to be considered in determining whether a confession was obtained in violation of fundamental fairness.

Two fundamental observations should be made at this point. The United States Supreme Court has held that the privilege against self-incrimination contained in the Fifth Amendment does not apply to the states through the due process clause of the Fourteenth Amendment.[50] The Supreme Court has also held that due process requires a state to appoint counsel in a case involving a capital offense but not in a case involving a non-capital offense.[51]

In *Spano v. New York*,[52] where the defendant was unstable, and for a

45. 356 U.S. 560 (1958).
46. 357 U.S. 433 (1958).
47. Id. at 438.
48. Id. at 441.
49. 357 U.S. 504 (1958).
50. Twining v. New Jersey, 211 U.S. 78 (1908).
51. Betts v. Brady, 316 U.S. 445 (1942); Powell v. Alabama, 287 U.S. 45 (1932).
52. 360 U.S. 315 (1959).

period of eight hours, through the night, was subjected to questioning by many interrogators, was refused his request to call counsel, and was subjected to the false pleas of his close friend, the United States Supreme Court held that the confession was involuntary. It did not decide that he had an absolute right to counsel after indictment and before trial (four justices in concurring opinions would have so decided), but it did say that in cases where the defendant confesses following indictment, the confession would be subjected to careful scrutiny.

When the *Spano* case was before the New York Court of Appeals, the majority of the Court affirmed the conviction on the grounds that the confession was voluntary. They said that even if the detention was illegal, the *McNabb* rule,[53] as stated and upheld in *Mallory v. United States*,[54] did not apply since it was a federal rule of evidence and therefore did not bind the states through the Fourteenth Amendment. They also said that the Code of Criminal Procedure provided for counsel only after arraignment,[55] and that here the defendant did in fact have advice of his counsel but chose not to follow it. They held also that there was no violation of defendant's right against self-incrimination. The dissent's position was grounded on the premise that after the indictment is handed down, the judicial process has begun, and questioning thereafter breaches both the Court's mandate to provide a prompt trial and defendant's rights. They said it violated two rights: his right to counsel through the entire proceeding, and his right against self-incrimination.

Prior to *Spano*, the New York privilege against self-incrimination was stated, by Justice Cardozo, to be violated when ". . . incriminatory disclosure has been extorted by constraint of legal process directed against a witness."[56] The defendant had a right to counsel only after arraignment, both by statute,[57] and by judicial decisions interpreting the statutes.[58] The admissibility of confessions in New York had always been controlled by the voluntary-trustworthy test and is provided for in Section 395 of the Code of Criminal Procedure.

In *People v. Mondon*,[59] the Court of Appeals discussed three cases involving statements taken before a coroner's jury. The issue in each was whether the statements were voluntary and trustworthy. The first case had held the statements admissible on the grounds that defendant was not a suspect at that time and, therefore, was examined not as a party but as a witness.[60] The second case had held that where the defendant was a suspect and under oath, the statements were inadmissible, not because they violated his rights, but because the coercion involved in testifying under oath while a suspect made

53. McNabb v. United States, 318 U.S. 332 (1943).
54. 354 U.S. 449 (1957).
55. See N.Y. Code Crim. Proc. §§ 188, 189, 296-a, 308, 699.
56. People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926).
57. Supra note 55.
58. People v. Marincie, 2 N.Y.2d 181, 158 N.Y.S.2d 569 (1957); People v. McLaughlin, 291 N.Y. 480, 53 N.E.2d 356 (1944).
59. 103 N.Y. 211 (1886).
60. Hendrickson v. People, 10 N.Y. 13 (1854).

them untrustworthy.[61] The third case had held that even though the defendant was a suspect and under oath, since he had been told he did not have to testify, his statements were voluntary and admissible.[62]

The majority of the Court, in *People v. DiBiasi*,[63] reversed a conviction for first degree murder on the grounds that the use of admissions (whether obtained by fair or unfair methods) made by the defendant after his voluntary surrender for arraignment subsequent to indictment was an error requiring reversal. They held that the questioning violated defendant's constitutional rights. They discussed *Spano v. New York* and indicated that four justices took the position that after indictment the defendant had an absolute right to have his attorney present at all interrogations. They also decided that this was testimonial compulsion. They did not decide that the admissions were involuntary or that fundamental fairness had been violated. This is interesting since the dissenters in *Spano*, who presently constitute the majority in the Court of Appeals and wrote the opinion in *DiBiasi*, based their opinion on the holdings in *Mondon* and *McMahon*. They analyzed those cases as holding that there was a violation of defendant's rights so fundamental that a reversal was required as a matter of law.

The actual confusion as to the effect of *Spano* and *DiBiasi* was pointed out rather vividly in a recent decision before the Court of Appeals.[64] On a John Doe indictment for 1st degree robbery, 2nd degree grand larceny and assault, the Court upheld the Appellate Division's reversal of the conviction.[65] They held that after indictment absolutely no statement could be used unless counsel was present; that it was testimonial compulsion; that this was the rule whether defendant had counsel of record or not; and that it was not restricted to capital cases. Judge Van Voorhis dissented (he had voted with the majority in *DiBiasi*) on the ground that *DiBiasi* did not apply in the case of a John Doe indictment. Although he does not state his reasons, could it be that he is looking back to the old trustworthy test?

The principal case seems a clear expansion of the law. The first basis of the decision was that it violated fundamental fairness; but the Court did not explain how. The statement on its face was voluntary,[66] and when it was given, after arrest, defendant had no Federal Constitutional right to counsel, nor did *DiBiasi* or *Waterman* give him that right. The second basis was testimonial compulsion. This is difficult to see in this context since defendant had not been indicted, nor was he under oath, nor had the criminal proceeding started in any sense of the word.

61. People v. McMahon, 15 N.Y. 386 (1857).
62. Teachout v. People, 41 N.Y. 7 (1869).
63. 7 N.Y.2d 544, 200 N.Y.S.2d 21 (1960).
64. People v. Waterman, 9 N.Y.2d 561, 216 N.Y.S.2d 70 (1961).
65. 12 A.D.2d 84, 208 N.Y.S.2d 596 (1st Dep't 1960).
66. "Q. James, do you want to make a statement? A. I do."
"Q. Do you want to see your lawyer as you told me before? A. No, I tell you the truth, everything that happened."

Although it may be reasonable after indictment to require the presence of counsel, since it can be assumed that after indictment the State probably has its case prepared and is merely attempting to bolster it by defendant's admissions, this does not seem to be the case after arrest. This may have been Judge Van Voorhis' real reason for dissenting in *Waterman*.

The actual application of the principal case is not clear. As has been previously stated, police officers are not required to inform the defendant of his rights. Since these precedents were not overruled, the question remains whether the right to counsel is absolute after arrest, or whether it is only the failure to answer the defendant's inquiry which renders the statement inadmissible. If the principal case's holding is to be construed as giving an absolute right to counsel, it may have a serious effect on the administration of criminal justice; if it is to be restricted to the case where the inquiry goes unanswered, what is the result if the inquiry is answered "yes" or "no"?

It is difficult to predict the exact future effect of the principal case. It is clear at this point that after indictment, counsel must be present at all questionings. Although a recent decision in the Appellate Division held that the right to counsel was absolute after arrest,[67] this writer doubts if the Court of Appeals will go that far.

R. E. N.

DUE PROCESS REQUIRES COUNSEL IN WAYWARD MINOR PROCEEDING

Since the turn of the century, the state and federal courts of this country have been harrassed by the problem of balancing the needs implicitly expressed in social-reform legislation with the constitutional commandments they have sworn to uphold. One area in which this "balancing" problem has been acutely difficult concerns the crimes or misconduct of infants. Juvenile Delinquency and Wayward Minor Statutes seek to rehabilitate a child in preference to administering punishment. The most popular method of achieving this goal is to relax the protections of the ordinary trial process so that sociological and psychological considerations may be dispositive. While the courts may admire this end, the burden remains with them to determine when the process of relaxation shades into a denial of constitutional rights. The leading case of *People v. Lewis*[68] presented just such a confrontation in 1932, and the recent case of *People v. James*,[69] vividly illustrates that the problem is still with us, little diminished in difficulty.

Title VII-A of the Code of Criminal Procedure,[70] first added to the statute books in 1923, provides the procedure for hearing wayward minor charges. In its current form it provides that any magistrate other than a justice of the peace may, upon an information laid before him by a variety of persons, hear

67. People v. Meyer,—A.D.2d—(1st Dep't October 10, 1961).
68. 260 N.Y. 171, 183 N.E. 353 (1932).
69. 9 N.Y.2d 82, 211 N.Y.S.2d 170 (1961).
70. N.Y. Code Crim. Proc. §§ 913-a to 913-dd.